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No. 80-988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HAVENS REALTY CORPORATION and ROSE JONES,
Petitioners,

v.

SYLVIA COLEMAN, R. KENT WILLIS and
HOUSING OPPORTUNITIES MADE EQUAL,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should reconsider the unanimous decision of the Fourth Circuit that respondents have standing under the Fair Housing Act.

2. Whether this Court should reconsider the unanimous decision of the Fourth Circuit as to when an action must be commenced under the Fair Housing Act.

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondents respectfully pray that petitioners' request for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case be denied.

OPINIONS BELOW

Since the filing of the petition for a writ of certiorari, the opinion of the Court of Appeals has been reported at 633 F.2d 384 (4th Cir. 1980).

STATEMENT OF THE CASE

This litigation challenges petitioners' practice of "racial steering", a form of racial discrimination. Specifically, as alleged in the complaint, petitioners have preserved and encouraged racial segregation in the Richmond, Virginia metropolitan area by steering white applicants toward apartment buildings occupied primarily by white tenants and by steering black applicants away from apartment buildings inhabited primarily by white tenants. Petitioners' different treatment of white and black applicants on the basis of such applicants' race or color violates both the Fair Housing Act of 1968, 42 U.S.C. §3601 *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. §1982.

The complaint, which is reproduced in the Appendix to the Petition for Writ of Certiorari (hereinafter "Pet. App.") at 27, was filed on January 9, 1979 in the United States District Court for the Eastern District of Virginia by Paul Allen Coles, Sylvia Coleman, R. Kent Willis and Housing Opportunities Made Equal ("HOME"). Named as defendants were Havens Realty Corporation ("Havens") and Rose Jones. The district court's jurisdiction was based upon 42 U.S.C. §3612(a) and 28 U.S.C. §§1331, 1337, 1343(4) and 2201.

The individual plaintiffs, all residents of the City of Richmond or Henrico County, Virginia, are members of a class composed of all persons who have rented or sought to rent residential property in the Richmond metropolitan area and who are adversely affected by the discriminatory acts, policies and practices of petitioners. HOME is a Virginia non-profit membership corporation whose purpose is to make equal housing opportunities a reality. To this end, HOME operates a counseling service

whereby people interested in residing in the Richmond metropolitan area can obtain advice on available housing. HOME also investigates discrimination complaints made by those who use its counseling services and conducts independent investigations of real estate brokers in the Richmond metropolitan area to determine whether they provide equal housing opportunities to customers. Respondents, Sylvia Coleman, a black woman, and R. Kent Willis, a white man, were full-time employees of HOME at all relevant times described in the complaint. (Pet. App. 28-30)

Petitioner Havens is a Virginia corporation engaged in providing real estate brokerage services for apartment rental units. Havens owns and manages Camelot Townhouses and Colonial Court Apartments in Henrico County, within the Richmond metropolitan area. Petitioner Rose Jones was, and to the best of respondents' knowledge still is, an employee of Havens. (Pet. App. 30)

The complaint alleged, *inter alia*, that respondents Coleman and Willis and the class they represent were, as a result of petitioners' unlawful practices, deprived of important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices. The complaint further alleged that petitioners' practice of racial steering has frustrated HOME's efforts to assist its members and other individuals obtain equal access to housing. The specific actions of petitioners which the Fourth Circuit found, if proved at a trial on the merits, would constitute racial discrimination in violation of the Fair Housing Act are set forth in the complaint (Pet. App. 31-34) and are summarized in the Fourth Circuit's opi-

nion. (Pet. App. 5-7) Since, in the present posture of this case, the factual allegations in the complaint must be accepted as true, the specific actions of petitioners which establish a pattern of racial discrimination are not repeated here.

On February 16, 1979, the district court, in response to petitioners' motion to dismiss, concluded that respondents' claims were barred by the 180-day statute of limitations established by 42 U.S.C. §3612(a). The district court also found that respondents lacked standing to pursue the matters alleged in the complaint and thus sustained petitioners' motion to dismiss. Each of the respondents filed a timely notice of appeal to the Fourth Circuit. The complaint of plaintiff Paul Allen Coles was not dismissed and Coles therefore was not an appellant in the proceeding below and is not a respondent in this Court. See Petition for Writ of Certiorari (hereinafter "Petition"), p.i.

On September 18, 1980, the Fourth Circuit unanimously reversed the district court and held instead: (1) Coleman and Willis have standing as testers to institute and prosecute the complaint; (2) even if Coleman and Willis do not have standing as testers, each has alleged sufficient personal harm to satisfy standing requirements; (3) HOME has standing both as a representative of its members and on the basis of alleged harm to HOME; and (4) none of the allegations in the complaint is time-barred by the 180-day provision contained in 42 U.S.C. §3612(a).

On December 16, 1980, Havens and Jones petitioned this Court to grant a writ of certiorari to review the decision of the Fourth Circuit. On January 7, 1981, respondents were granted an extension to February 17, 1981 in which to file this Brief in Opposition.

SUMMARY OF ARGUMENT

A unanimous panel of the United States Court of Appeals for the Fourth Circuit correctly held that respondents Willis and Coleman have standing as testers to challenge petitioners' practice of racial steering, a form of racial discrimination. The Fourth Circuit's conclusion does not warrant review by this Court because of the Fourth Circuit's attention to the particular facts of this case which made respondents bona fide testers. Moreover, the Fourth Circuit's alternative holding that, *even absent their tester status*, respondents alleged sufficient personal harm to grant them standing in their own right means that the question left unanswered by this Court in *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979), namely, whether a tester has standing to initiate litigation under the Fair Housing Act, will remain unresolved even if this Court agrees to review and decide this case.

The Fourth Circuit also unanimously and correctly held that the organizational plaintiff HOME had standing to litigate the claims set forth in the complaint both on behalf of its members and as a result of direct injury to itself. These conclusions do not warrant review by this Court.

The final ground advanced by the petitioners to justify the grant of the writ of certiorari is the alleged conflict between the Third and Fourth Circuits regarding the 180-day statute of limitations established by 42 U.S.C. §3612(a). Because the case relied upon by petitioners to establish a conflict did not, like the instant case, involve a continuing practice of discriminatory actions, the alleged conflict simply does not exist.

REASONS FOR DENYING WRIT

I. The Grant Of a Writ Of Certiorari To Review The Unanimous Decision Of The Court Below Would Not Resolve The Question Whether A "Tester" Has Standing Under The Fair Housing Act.

During 1978, respondent Willis, who is white, and respondent Coleman, who is black, contacted the defendants on several occasions to ascertain the availability of rental housing in the two apartment complexes owned by the defendant Havens. These inquiries were made in the course of respondents' employment by HOME and were designed to determine whether defendants were engaged in racial steering. The Court of Appeals concluded that, under these circumstances, the respondents have standing as "testers" to initiate a lawsuit under the Fair Housing Act challenging the defendants' practices.

In *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 111 (1979), this Court found it unnecessary to consider whether an individual had standing to sue under the Fair Housing Act based upon his or her status as a tester. The Fourth Circuit concluded in the instant case that respondents Willis and Coleman, as employees of HOME, were "bona fide testers" (Pet. App. 8) who "in their capacity as employed testers" (Pet. App. 9) had standing to "assert the rights of third parties." (*Ibid.*) In partially answering in the affirmative the question left unresolved in *Bellwood*, the Fourth Circuit relied upon this Court's decisions in *Pierson* v. *Ray*, 386 U.S. 547 (1967) and *Evers* v. *Dwyer*, 358 U.S. 202 (1958) for its conclusion that Coleman and Willis satisfied the requirements of standing contained in Article III of the United States Constitution.

In concluding that Coleman and Willis had standing under the Fair Housing Act, the Fourth Circuit did not find it "necessary to formulate a general rule circumscribing standing for the tester plaintiffs." (Pet. App. 10) Rather, the Fourth Circuit was content to note that Congress, as part of the process of eradicating racial discrimination in housing, "a social evil so antithetical to a free and democratic society that Congress has devised special and sharp tools for its excision," (Pet. App. 8) had intended standing under the Fair Housing Act to be as broad as permitted under Article III. (Pet. App. 9) *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. at 109; *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972). Thus, the Fourth Circuit held that bona fide testers, such as Coleman and Willis, "occupy a narrow island limited to areas fundamentally necessary for access to the federal courts as presented by *Pierson* or *Evers*, or, as here, where Congress has recognized a similar deeply-grounded human right." (Pet. App. 10)

One reason this Court found it unnecessary to decide in *Bellwood* whether testers have standing under the Fair Housing Act was that the plaintiffs in *Bellwood*, without regard to their status as testers, alleged sufficient injury to themselves to provide standing under the Fair Housing Act and Article III. Similarly, in the instant case, the Fourth Circuit found that the plaintiffs "Willis and Coleman have standing as testers but, *even if this were not so, they have alleged sufficient personal harm to give them standing.*" (Pet. App. 7 [emphasis added]) Thus, the same alternative holding which resulted in this Court's declining to resolve in *Bellwood* the question of tester standing will doubtless preclude this Court from deciding that issue in the instant case.

In sum, this case does not warrant this Court's review of the question of tester standing under the Fair Housing Act because: (1) respondents Willis and Coleman alleged sufficient personal harm to grant them standing to pursue the allegations set forth in the complaint without regard to their status as testers; (2) the Fourth Circuit's opinion only partially answers the question left unresolved in *Bellwood*; and (3) the decision of the court below was correct.

II. This Case Does Not Raise Important Questions Concerning Standing Under This Court's Decision In *Trafficante* v. *Metropolitan Life Insurance Co.* And *Gladstone, Realtors* v. *Village Of Bellwood.*

Petitioners request that this Court grant a writ of certiorari because "the Court of Appeals went far beyond this Court's prior decisions concerning standing under the Fair Housing Act in *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979), and *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972)." (Petition, p.14) In fact, the court below merely applied, in a correct and articulate manner, the holdings of *Bellwood* and *Trafficante* to the complaint filed by Willis and Coleman in the district court. (Pet. App. 10-14) Indeed, as the court below noted, the plaintiffs have alleged "violations of their right to enjoy the fruits of an integrated community in much the same language as the individual plantiffs in *Trafficante* and *Bellwood*" (Pet. App. 10) and claimed "deprivation of community rights [in language] at least as specific" as the allegations and claims approved in *Bellwood* and *Trafficante*. (Pet. App. 11)

The petitioners place particular reliance upon the fact that Coleman and Willis are residents of a larger geographical area than the plaintiffs in *Bellwood* or *Trafficante*. Significantly, the petitioners in *Bellwood* similarily attempted to distinguish *Trafficante* on the grounds that "there is a critical distinction between an apartment complex, even one as large as that in *Trafficante*, and a 12 by 13 block residential neighborhood." 441 U.S. at 113 (footnote omitted). This Court, while recognizing the factual distinctions between the communities involved in *Trafficante* and *Bellwood*, did not view these distinctions as relevant to the question of plaintiffs' standing:

> The constitutional limits of respondents' standing to protest the intentional segregation of their community do not vary simply because that community is defined in terms of city blocks [as was the case in *Bellwood*] rather than apartment buildings [as was the case in *Trafficante*]. Rather, they are determined by the presence or absence of a "distinct and palpable injury", *Warth* v. *Seldin*, 422 U.S. at 501, to respondents resulting from petitioners' conduct.

Gladstone, Realtors v. *Village of Bellwood*, 441 U.S. at 114.

This Court in *Bellwood*, 441 U.S. at 115, the Fourth Circuit in the decision below (Pet. App. 16-17) and respondents all recognize that there is a distinction between the factual allegations necessary to confer standing and the proof necessary to support a finding of actual injury. All the Fourth Circuit concluded, and all respondents maintain, is that the complaint contains sufficient specificity of "distinct and palpable injury" to Willis and Coleman resulting from the unlawful discrimination practiced by petitioners to confer standing

under the Fair Housing Act and the opportunity to prove, at a trial on the merits, the extent of that injury.

This is not a case where the lower courts have misconstrued the prior opinions of this Court. Accordingly, this Court should not grant the writ of certiorari for the purpose of affirming the Fourth Circuit's decision and in the process re-affirming the holdings of *Bellwood* and *Trafficante*.

III. There Is No Conflict Between The Decisions Of The Fourth And Seventh Circuits Concerning An Organizational Plaintiff's Standing Under The Fair Housing Act.

The Fourth Circuit also concluded that the organizational plaintiff, HOME, alleged sufficient injury to itself so as to confer standing on HOME directly. In so holding, the court below distinguished the very decision of the Seventh Circuit which petitioners cite as creating a conflict, *Village of Bellwood* v. *Gladstone, Realtors*, 569 F.2d 1013 (7th Cir. 1978), *aff'd on other grounds, Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979), by finding that the injuries alleged by HOME were specific injuries rather than "the protestations of general interest found to be insufficient for standing in *Sierra Club* v. *Morton*, 405 U.S. 727 (1972) and *Warth* v. *Seldin, supra, and by the court of appeals in Bellwood*, 569 F.2d 1013, 1917 [sic] (1978)." (Pet. App. 15 [emphasis added])

Unlike the organizational plaintiff in *Bellwood*, HOME has alleged that it has been and continues to be engaged in counseling services and projects in fulfillment of its purpose, activities which are directly impeded and frustrated by petitioners' practice of racial steering. The Fourth Circuit, aware of this distinction, found that the

injuries alleged by HOME approached the injuries suffered by the non-profit developer granted standing in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). (Pet. App. 15)

As an alternative holding, the Fourth Circuit found that HOME's complaint satisfied the requirements of representational standing established by this Court in *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). (Pet. App. 14) Specifically, the court below found that HOME met the *Hunt* standards because: (1) HOME's members would, on the basis of the allegations set forth in the complaint, have standing to bring suit on their own behalf; (2) the interests HOME sought to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, required the participation of the individual members in the law suit. *Ibid; see also Warth* v. *Seldin*, 422 U.S. 490 (1975).

As was the case with the individual respondents, the Fourth Circuit found two independent grounds for granting HOME standing: (1) injury to HOME's members and (2) injury to HOME itself. Given this Court's recent pronouncements on organizational standing, a review by this Court of the Fourth Circuit's unanimous conclusion that HOME has standing in this case is not likely to provide any more meaningful guidance to the lower courts on how to resolve this issue than already exists. The factual question whether the Fourth Circuit correctly drew the line either (a) between "specific injuries" and "protestations of general interest" or (b) in its application of the *Hunt* standards to the complaint filed in the district court is certainly not worthy of this Court's consideration.

IV. There Is No Conflict Between The Decision Below And A Decision Of The Third Circuit Concerning The 180-Day Statute Of Limitations Established By Section 812 Of The Fair Housing Act.

Section 812 of the Fair Housing Act; 42 U.S.C. §3612(a), requires that "[a] civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred." Although all but one of the specific acts evidencing petitioners' unlawful practices transpired more than 180 days before the complaint was filed, respondents maintain, and the court below determined (Pet. App. 17-20), that none of the allegations in the complaint is time-barred:

> Coleman, Willis and HOME were involved in active, consecutive, connected, and continuing attempts to secure or determine compliance with the Fair Housing Act. The defendants, just as resolutely, continued their practice of prohibited discrimination against these specific individuals. This, under the circumstances, is a continued relationship between the defendants and the plaintiffs and a continued violation of §3604 so that the violations continued to "occur" until the last act of July 13, 1978. By the very nature of these offenses, "occurrence" must be thus construed to effect the remedial purposes of the act.

(Pet. App. 20)

The petitioners now urge this Court to grant certiorari in order to resolve an alleged conflict between the decision of the court below and the Third Circuit's opinion in *Meyers* v. *Pennypack Woods Home Ownership Association*, 559 F.2d 894 (3d Cir. 1977), as to when an event occurs which gives rise to a cause of action under the Fair Housing Act. On this point, however, peti-

tioners can find no solace in *Meyers*. Indeed, in their Petition, petitioners note merely that in *Meyers* the Third Circuit "*appeared* to question whether or not the continuing violation rationale was appropriate under Title VIII." (Petition, p.21 [emphasis added])

The reason for petitioners' seeming lack of confidence in the *Meyers* precedent is readily apparent from a reading of the Third Circuit's opinion. In *Meyers* the plaintiff, some two and one-half years before the complaint was filed, asked the defendant to place his name on a waiting list to purchase a home in a residential community which was controlled by the defendant. The Third Circuit held that, in this situation, the 180-day statute of limitations began to run on the date the defendant refused to place Meyers' name on the waiting list. The Third Circuit acknowledged that employment discrimination cases dealing with an analogous statute of limitations period under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, have held that a discriminatory refusal to hire may constitute a continuing violation. "Those cases," the Third Circuit noted, "were class actions involving alleged patterns and practices of discrimination continuing to affect all members of the plaintiff class whereas the instant case [*Meyers*] concerns a discrete [single] act of alleged discrimination against the individual plaintiff." 559 F.2d at 899.

In the instant case, the Fourth Circuit, in holding that plaintiffs' allegations were not time-barred by the 180-day period, was careful to focus upon the particular factual circumstances which gave rise to the complaint. As the Fourth Circuit noted, the plaintiffs "were involved in active, consecutive, connected, and continuing attempts to secure or determine compliance with the Fair Housing Act" while the defendants "just as resolutely,

continued their practice of prohibited discrimination." (Pet. App. 20) Thus, the instant case like the employment discrimination cases — but unlike *Meyers* — involves "patterns and practices of discrimination continuing to affect all members of the plaintiff class." *Meyers*, 599 F.2d at 899. There is, therefore, every reason to believe the Third Circuit panel which decided *Meyers* would have decided the instant case in the same manner as the court below. In any event, no conflict among the circuits now exists.

CONCLUSION

Because this case does not present any of the special and important reasons enumerated in this Court's Rule 17.1 as a reason for granting the writ of certiorari, respondents urge that the petition be denied.

Respectfully submitted,

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